IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3535 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HIRACHAND SHYAMJIBHAI LODAYA HAVING DIED THROUGH HIS

Versus

THE COTTONCORPORATION OFINDIA

Appearance:

MR KS JHAVERI for Petitioner No. 1 and 1/2
MR DC DAVE for Respondent No. 1 and 2

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 09/07/2001

ORAL JUDGEMENT

By means of this petition, the petitioner has sought for a declaration that Regulation 12 of the Cotton

Corporation of India Ltd. Service Regulation is ultra-vires and is against the Public Policy and also to quash and set aside the orders of compulsory retirement dated 10-8-1987 and 11-8-1987 annexure-A collectively and for further direction to the respondents to reinstate the petitioner with continuity of service and other benefits.

2. The petitioner was a graduate from Nagpur University with a decree of B. Com. He joined the Maharashtra State Government Marketing Federation as a Cotton Selector from 1972. The petitioner served the Maharashtra State Cooperative Marketing Federation upto 1977. Thereafter, the petitioner joined the respondent Corporation in the year 1977 as a Cotton Purchase Officer and thereafter he was promoted as Sr. Chief Purchase Officer in the year 1982 under Regulation 12 of the Cotton Corporation of India Ltd. Service Regulation (hereinafter referred to as CCI Service Regulation). The petitioner having attained the age of 50 years on 7-7-1986 was ordered to retire from the service of the respondent Corporation on and from 11-8-1987 on payment of a sum equival to the amount of his pay plus allowance for a period of three months calculated at the same rate at which he was drawing his pay and allowances immediately before his retirement. This order was passed as it was in the respondent Corporation's interest to do so. The petitioner was informed by the office of the respondent Corporation that the competent authority has decided in the public interest to prematurely retire the petitioner under the proviso of Regulation 12 of the CCI Service Regulation and he was relieved from the service of the respondent Corporation with effect from 11-8-1987 and cheque No.594582 dated 11-8-1987 for Rs.4215-90 was enclosed towards three months notice pay and allowance as per the Rules. Regulation 12 of the CCI Service Regulation reads as under :

"12 - Retirement : Every employee shall ordinarily retire on attaining the age of 58 years. The retention of an employee beyond the age of 58 years in the Corporation's service where such retention is considered to be in the interest of the Corporation shall require the approval of Board of Directors.

Provided however, that notwithstanding the provisions contained in the above Regulation, the Management, shall if it is of the opinion that it is in Corporation's interest to do so, have absolute right to retire any employee after he attains the age of 50 years by giving him 3

> months notice or 3 months pay and allowances in lieu of such notice without assigning any reason. Similarly, an employee may also, after attaining the age of 50 years, voluntarily retire after giving three months notice in writing to the Corporation. But it shall be open to the Management to withhold permission to an employee under suspension to seek retire under this clause"

3. Thus, by the order dated 10-8-1987 services of the petitioner after giving three months salary along with allowances were terminated and the petitioner was prematurely retired relying upon aforesaid Regulation 12. It is stated that the petitioner was required to supply copy of the aforesaid Regulation which was not supplied to him and he could not challenge the said order because of nonavailability of the aforesaid Regulation and that Regulation has been challenged in view of the Supreme Court's decision. It is also stated that the provisions are against the public policy in view of the fact that it violates the provisions of Section 23 of the Contract Act. It also violates the provisions of Article 14, 39 and 41 of the Constitution of India and is arbitrary. It is also stated that the confidential reports of the petitioner have not been looked into at the time when the impugned orders were passed as the services of the petitioners were beneficial to the respondent Corporation. Hence, the petitioner was not inefficient, corrupt, dishonest, deadwood and he could not have been compulsorily retired by the respondent Corporation. Regulation 12 has also been challenged on the ground that there are similar provisions, the fundamental rules of the Central Government as well as in the Bombay Civil Service Rules, the age limit prescribed for the compulsory retirement is 55 years. While, the provisions of Regulation 12 provide for retirement of the employee at the age of 50 years which is arbitrary and without any base and in violation of Article 14 of the Constitution of India. The petitioner was not served with a show cause notice before passing the impugned orders of compulsory retirement. Before imposing penal compulsory retirement by the respondent Corporation the petitioner has not been given any opportunity of hearing and hence the impugned orders of compulsory retirement are bad and are violative of Article 14 and 16 of the Constitution of India and against the principles of natural justice. The Confidential Reports for the year 1982-83 which were adverse were communicated to the petitioner but they have been replied by the petitioner and that those adverse remarks were pertaining to the damage to the cotton seeds

sale which was not the assignment of the petitioner. It is also stated that before giving penalty of compulsory retirement the appropriate authority should have given an opportunity of being heard to the petitioner. It is also stated that the petitioner was under the C.B.I. Inquiry on 23-9-1987 and under that pretext the respondents have terminated services of the petitioner relying upon aforesaid Regulation 12 and retirement dues namely gratuity and other benefits are not paid to the petitioner so far.

4. It is also stated that the affidavit-in-reply has been filed on behalf of the respondent no. 1 but original copy of that affidavit-in-reply has not been placed on record. It is also stated by the learned counsel for the petitioner that he has also filed rejoinder affidavit but the original thereof is not available on record and hence photostat copy of the affidavit-in-reply and rejoinder affidavit are placed on record.

4. Heard the learned counsel for the parties and perused the relevant papers on record.

5. Learned counsel for the petitioner has raised dispute with regard to validity of the Regulation 12 which has already been reproduced earlier in this judgment. It is also submitted that the similar provisions of Rule 9 (i) of the Central Transport Corporation Ltd. Service (Discipline & Appeals) Rules, 1979 have been declared by the Supreme Court as ultra-vires in the case of Central Inland Water Transport Corporation Ltd. Brojo Nath Ganguly and Another, reported in 1986 SC 1571. Rule 9 of the Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules of 1979, reads as under :

"Termination of Employment for Acts other than Misdemeanour.

(i) The employment of a permanent employee shall be subject to termination on three months' notice on either side. The notice shall be in writing on either side. The Company may pay the equivalent of three months' basic pay and dearness allowance, if any, in lieu of notice or may deduct a like amount when the employee has failed to give due notice.

(ii) The services of a permanent employee can be terminated on the grounds of "Services no

longer required in the interest of the Company" without assigning any reason. A permanent employee whose services are terminated under this clause shall be paid 15 days' basic pay and dearness allowance for each completed year of continuous service in the Company as compensation. In addition he will be entitled to encashment of leave at his credit."

6. According to the learned counsel for the petitioner, provisions of Rule 9 (i) of the aforesaid Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules of 1979 has been declared as ultra-vires and discriminatory. Hence aforesaid Regulation 12 on the same footing is liable to be struck down as discriminatory under Article 14 of the Constitution of India and it is liable to be held as ultra-vires. Learned counsel for the petitioner also referred to para 101 of the aforesaid decision of the Supreme Court, wherein it is held as under :

"A clause such as Rule 9 (i) in a contract of employment affecting large sections of the public is harmful and injurious to the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such a clause, therefore, is opposed to public policy and being opposed to public policy, it is void under Section 23 of the Indian Contract Act.

7. I have carefully considered the aforesaid contention of the learned counsel for the petitioner. I do not find any force in the same inasmuch as Rule 9 (i) referred to in the case of Central Inland Water Transport Corporation Ltd. (supra) is in respect of the acts committed by the employee which amounts to misconduct and for such misconduct the authority is entitled to take three types of procedures for taking action against the employee. First is to pass an order under Clause 9 (i) and 9 (ii) and second is to initiate an inquiry against the erring employee therefor and after holding the inquiry an order can be passed for punishment or before completing the inquiry an order is passed either under clause (i) or (ii) or Rule 9 (i) then it would be discriminatory and such power should not be exercised in discriminatory way and for the same act one procedure is adopted and for the very same act another procedure is adopted and then for the same act third procedure is adopted for taking action against erring employee. In the present case, the facts of the case indicate

something else. The proposition of law enumerated in the aforesaid decision of the Supreme Court is totally different. In the present case, the High Level Committee was appointed to review the case of the petitioner and after considering 10 years service record of the petitioner the High Level Committee recommended to pass the orders and on the basis of that recommendation the impugned orders have been passed retiring the petitioner prematurely under aforesaid Regulation 12. Regulation 12 is similar to the provision of Rule 56 (i) of Fundamental Rules and even after appointment order if it is found that it is not in the public interest to appoint Government servant on class I post, by giving notice only three months in writing or three month's pay and allowance in lieu of such notice, a specific procedure has been provided for reviewing service record and if it is found that continuous of service of an employee is not in the interest of the public the State Government has absolute power to retire that person. For that purpose the provisions have been made that the Review Committee will consider 10 years' service record of the employee and thereafter the Review Committee can come to a conclusion that service of such person can be continued or person can be retired prematurely at the age of 55 years. It is a discretionary law. In the present case, the order has been passed and it has been considered by the authority that the appointment of the petitioner was on probation and as the performance of the petitioner was not found satisfactory, his probation was extended for a period of six months vide order dated 16-10-1978. The petitioner was promoted as Senior Cotton Purchase Officer with effect from 30-10-1982 and that promotion of the petitioner was also on probation. The performance of the petitioner was again not found satisfactory and as a result thereof, his probation period was extended thrice. The petitioner was chargesheeted in the year 1983 and as a result thereof, upon the conclusion of the departmental inquiry, two increments of the petitioner were withheld with cumulative effect vide order dated 3-8-1984 passed by the respondent no. 1. Thereafter, the petitioner was again chargesheeted in the month of October, 1985 and as a result thereof upon the conclusion of the departmental inquiry, a major penalty of reduction to the lower post was served upon the petitioner vide order dated 5-5-1986 passed by the respondent no. 2. It is also considered that the petitioner was served with a memo dated 7-6-1978 whereby the petitioner was called upon to explain as to why he left the headquarter without prior and specific permission of the competent authority. The petitioner was also served with a letter dated 9-11-1978 whereby the petitioner was warned for neglecting the instructions

issued for preparing invoices for cotton seeds. The petitioner was also served with letter dated 2-8-1979 whereby he was called upon to explain as to why he did not sign his leave application in the prescribed form and further as to why he did not send his joining report. The petitioner was also served with a memo dated 23-8-1980 whereby the petitioner was called upon to explain as to why there has been delay in despatch of bales. Thereafter, the petitioner was telegraphically intimated on 22-5-1981 to resume duty immediately and warned for leaving the headquarter without prior permission. The petitioner was further served with a memo dated 16-6-1981 whereby the petitioner was called upon to explain as to why his period of absence from duty from 25-5-1981 to 3-6-1981 should not be treated as leave without pay in view of the fact that he left the headquarter without obtaining prior permission of the Competent Authority. The petitioner was also served with a memo dated 3-8-1981 whereby he was again warned for leaving headquarter without prior permission. The petitioner was also served with a memo dated 11-1-1983 whereby he was warned for refusing to give statement to the Assistant Manager (Vigilance) Bombay. The petitioner was further served with letter dated 2-3-1984 calling upon the petitioner to explain the reason for leaving the headquarter without prior permission of the Competent Authority. The petitioner was also given notice dated 17-11-1984 whereby the petitioner was called upon to explain his absence from job without applying for any leave and after considering the reply submitted by the petitioner, the petitioner was served with an order dated 15-4-1985 whereby the petitioner was held guilty of unauthorised absence. The petitioner was also served with letter dated 19-4-1985 whereby the petitioner was warned for his lapses in the service, particularly, the purchases effected by the respondent Corporation at a higher rate than the support price and communicated to him by the Branch Office for S-6 variety. The petitioner was then served with a memo dated 8-8-1985 whereby he was called upon to explain as to why disciplinary action should not be initiated against him for his unauthorised absence from job. Thereafter, the petitioner was again served with letter dated 25-5-1987 whereby he was called upon to explain as to why his absence from job should not be considered as an authorised absence.

8. It is contended by the learned counsel for the petitioner that the impugned order of compulsory retirement has been passed on the basis of adverse remarks made against the petitioner for the year 1980-81. It appears that the Review Committee and the Competent

Authority have passed the impugned orders after considering the entire service record of the petitioner as stated above and it cannot be said that there is no material on record on which the impugned orders have been passed. On the basis of the material on record it cannot be said that the Review Committee has not considered the entire 10 years service record of the petitioner and the Competent Authority has passed the impugned order arbitrarily and in discriminatory manner and in violation of Article 14 and 16 of the Constitution of India. This Court cannot examine sufficiency of the evidence on the basis on which the impugned orders have been passed. In the facts and circumstances of the case, there cannot be any doubt that there is substantial material on record to pass the impugned order and it is not a case in which some acts have been committed by the petitioner amounting to misconduct and for avoiding inquiry, the Competent Authority has passed the impugned orders under Regulation 12 retiring the petitioner compulsory from the service.

9. Learned counsel for the respondent has referred to and relied on the decision of the Supreme Court in the case of Union of India Vs. J.N. Singha and another, reported in AIR 1971 SC 40, wherein it has been held that where an appropriate authority bona fide forms opinion that a Government servant be retired in public interest, he can pass order of compulsory retirement. That opinion cannot be challenged before Courts. Nor R. 56 (i) requires that the opportunity to show cause against compulsory retirement must be given. Order of compulsory retirement can be challenged only on the ground that either the requisite opinion was not formed or that the order was passed arbitrarily or on collateral grounds. It is further observed by the Supreme Court in the aforesaid decision that validity of Fundamental Rule 56 (i) was not question before the High Court nor before Supreme Court. Its validity is not open to question in view of the decision of this Court in the case of T.G. Shivacharana Singh V. State of Mysore, AIR 1965 SC 200.

10. The next contention of the learned counsel for the petitioner is that the petitioner has not been afforded any opportunity of hearing before passing the impugned orders retiring the petitioner compulsorily from service. I do not find any good ground that this argument can be entertained because the aforesaid Rule does not provide anywhere that even after reviewing 10 years service record of the petitioner, the petitioner is required to be given a notice of hearing or calling upon the petitioner for explanation as the said Rule does not require that opportunity of hearing should be afforded in

view of the statutory provisions of Rules and Regulations. It is further observed by the Supreme Court in the case of Union of India Vs. J.N. Singha (supra) that fundamental Rule 56 (i) holds the balance between the rights of the individual Government servant and the interests of the public. While a minimum service is guaranteed to the Government servant, the Government is given power to exercise its machinery and make it more efficient by compulsorily retiring those who in the opinion should not be there in public interest. Compulsory retirement involves no civil consequences. Rule 56 (i) is not intended for taking any penal action against the Government servants.

11. After careful consideration of the submissions made by the learned counsel for the parties as well as careful perusal of the relevant material on record I do not find any merit in this petition. Accordingly, this petition is dismissed. Rule is discharged with no order as to costs.

12. The petitioner has died on 1-3-1999. However, in case Rules and Regulations of the respondent Corporation permit family pension and retiral benefits to the heirs and legal representatives of deceased petitioner who retired prematurely, the respondents shall pass appropriate order for the family pension and other retiral benefits to be paid to the heirs and legal representatives of deceased petitioner. In case, if Rules and Regulation of the respondent Corporation require 10 years service of the employee for providing family pension to the heirs and legal representatives of deceased petitioner. In the present case, it appears that about three months' service is less in 10 years service of the petitioner. The appropriate authority shall consider and grant grace of three months' service and shall also pass appropriate order granting family pension and other retiral benefits to the heirs and legal representatives of the deceased petitioner. It is pointed out by the learned counsel for the petitioner from the orders dated 26-4-1990 and 9-4-1991 that amount of Rs.7,772-30 ps. towards gratuity was required to be paid to the petitioner and the same has not been paid to the petitioner so far. If said amount of Rs.7,772-30 ps. is not paid either to the petitioner or his heirs and legal representatives, the respondents are directed to pay the amount of Rs.7,772-30 to the heirs and legal representatives of the petitioner within two months from the date of presentation of a certified of this order together with interest @ 9% p.a.

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/JVSatwara/